

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMMY ALLEN ROSENBERG,

Defendant-Appellant.

UNPUBLISHED

July 19, 2007

No. 262673

Barry Circuit Court

LC No. 02-100200-FH

ON REMAND

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

This case returns to this Court for the third time, this time on remand from our Supreme Court with instructions to consider the monetary fine that defendant was sentenced to pay in light of *People v Antolovich*, 207 Mich App 714; 525 NW2d 513 (1994), and to determine whether resentencing is required because of the sentencing court’s remarks concerning defendant’s earlier acquittals. 477 Mich 1076; 729 NW2d 222 (2007). We conclude the \$25,000 fine imposed in this case violates neither Const 1963, art 1, § 16, nor the principle of proportionality. We also find the trial court’s remarks do not require resentencing. We affirm.

I. Facts and Proceedings

This case arose when defendant sold just under 2½ grams of cocaine to a police informant. Following a jury trial, defendant was convicted of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to fifteen to thirty years’ imprisonment, and a \$25,000 fine.

In defendant’s first appeal as of right, this Court rejected several of defendant’s claims of error, including prosecutorial misconduct, failure to grant a motion for change of venue, and ineffective assistance of counsel. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 251930) (*Rosenberg I*). But the Court identified two misscored sentence guidelines offense variables. *Id.*, slip op at 7. And although this Court agreed with the trial court “that the guidelines did not adequately reflect this particular defendant’s history and that a more properly proportionate sentence may be had by deviating upwards beyond the recommended minimum sentence range,” the Court nevertheless concluded that the extent of the trial court’s upward sentencing departure fell outside the principled range of outcomes. *Id.* at 9. Accordingly, the panel in *Rosenberg I* affirmed defendant’s conviction but,

without retaining jurisdiction, vacated defendant's sentence and remanded for resentencing. *Id.* at 10.

On remand, the trial court sentenced defendant to a prison term of ninety-two months (seven and two-thirds years) to twenty years and to pay a \$25,000 fine and costs of \$500. In his appeal as of right from this new sentence, defendant asserted that the sentence was still disproportionate, imposed an unconstitutionally excessive fine that violated the principle of proportionality, and that judicial fact finding violated his right to due process. This Court affirmed the new sentence of imprisonment, and reiterated that defendant was not entitled to have a jury determine all the facts affecting his sentence. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 262673) (*Rosenberg II*). But this Court vacated the assessment of \$500 in costs. *Id.* at 2. With respect to defendant's challenge to the \$25,000 fine, the Court found that defendant had waived the issue by failing to assert his claims in his first appeal by right. *Id.*

Defendant applied for leave to appeal to our Supreme Court. In lieu of granting leave, the Court reversed in part and remanded the case to this Court for further consideration. Our Supreme Court held that this Court "erred in ruling that the defendant waived his objection to the imposition of a \$25,000 fine" because once this Court vacated defendant's sentence in *Rosenberg I* and remanded for resentencing, "the case was before the trial court in a presentence posture, allowing for objection to any part of the new sentence." 477 Mich 1076. The Court remanded this case to this Court for consideration of defendant's fine in light of *Antolovich*, *supra*. In addition, the Court directed this Court "to address the propriety of the trial court's remarks regarding the defendant's prior acquittals," adding that if this Court "determines such remarks to have been inappropriate, it should determine whether resentencing is required." *Id.*

II. Analysis

A. The Trial Court's Remarks

At the resentencing hearing, the trial court continued to believe that substantial and compelling reasons existed for it to impose a sentence that departed upward from the recommended minimum sentence range of the guidelines, and in doing so the trial court incorporated into the record its reasons for imposing the first sentence. The essence of the trial court's remarks regarding defendant's prior acquittals are set forth in the original guidelines departure form where the trial court wrote:

The guidelines score no points for criminal behavior proved by a preponderance of the evidence which resulted in acquittals. This defendant was acquitted by juries of CSC third in 1997 and CSC first and delivery of cocaine to a minor in 2000. I presided at both trials and have concluded [that] this criminal behavior was proven by a preponderance of the evidence. There are numerous other examples of the defendant's criminal behavior which were referenced in the prosecutor's sentencing brief and for which there is a preponderance of evidence that the defendant committed the acts in question. I relied primarily on the evidence . . . I heard at the 1997 and 2000 rape trials.

The trial court also wrote that defendant “is an assaultive, dangerous person who utilizes drugs as part of a pattern of threatening, intimidating and predatory behavior towards others (particularly young women).” In its comments on the record in the original sentencing proceedings, however, the trial court indicated it was not making an independent finding of guilt regarding the prior acquittals, noting: “I have no quarrel with the juries’ verdicts in either case because, measured against the [standard of] proof beyond a reasonable doubt and taking into account the presumption of innocence, I - - I fully understand why the jury [sic] reached those verdicts.” The court also observed that if it were to impose sentence on the basis of assuming that defendant was guilty of the acquitted charges, the sentence “would be a lot longer than I intend to impose.”

In his supplemental brief, defendant does not assert the trial court made any new or additional remarks regarding acquittals, other than to note that a criminal sexual conduct (CSC) charge that was pending at the time of the original sentencing proceeding resulted in an acquittal, as the trial court had then predicted. Regarding that case, the trial court had originally observed, “I won’t be surprised if there is another not guilty verdict in that case because it’s essentially the same scenario, the defendant getting a young woman into a vulnerable position and taking advantage of her.” The court further observed, the case was “a he said/she said situation,” and “given the rights a criminal defendant has, it makes it difficult or impossible to obtain a conviction in that sort of case.” At the resentencing proceeding, the trial court again noted the three acquittals were of cases based on “their word against his.”

In remanding this case to this Court, our Supreme Court wrote, “we direct the Court of Appeals to address the propriety of the sentencing court’s remarks regarding the defendant’s prior acquittals. If the Court of Appeals determines such remarks to have been inappropriate, it should determine whether resentencing is required.” 477 Mich 1076. In compliance with our Supreme Court’s directive, we first note that the substance of the complained of remarks by the trial court were made at the original sentencing proceeding. Moreover, this Court has already addressed the propriety of the trial court’s remarks and determined that they did not require resentencing. A different panel of this Court opined in *Rosenberg I*:

Defendant also argues that the trial court erred when it considered defendant’s previous acquittals and pending charges. However, defendant is incorrect. This Court has held that a trial court may consider the acquittals and pending charges. See *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994). [*Rosenberg I*, *supra*, slip op at 8.]

Normally, when “an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454, 302 NW2d 164 (1981). The doctrine of law of the case will apply regardless of the correctness of the prior determination. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). A court may decline to apply the doctrine when the facts have materially changed, or to avoid injustice, *id.* at 340-341; *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981), but the record here discloses neither a material change of facts nor an injustice. Moreover, like the panel in *Rosenberg I*, we also find no impropriety in the trial court’s remarks, so we cannot hold that they warrant resentencing.

A sentencing court may take into account facts underlying uncharged offenses, pending charges, and acquittals. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), overruled in part on other grounds by *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). See also *People v Ewing (After Remand)*, 435 Mich 443, 446 (Brickley, J.), 473 (Boyle, J.); 458 NW2d 880 (1990). However, “[a] trial court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding.” *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996).

In this case, the trial court properly recognized its prerogative to find by a preponderance of the evidence facts relevant to determining an appropriate sentence and to consider criminal conduct determined on that basis even where the attendant charges resulted in acquittals. The court’s comments demonstrate that though it was sentencing defendant for the instant offense, it was considering his history of criminal convictions, and his long pattern of criminality as proven by conduct found on the basis of the preponderance of the evidence. There is no indication from the record that the court was seizing the opportunity to impose sentences for offenses that resulted in acquittals.

A criminal defendant is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Although ideally a judge “would always discreetly and circumspectly subordinate his opinions and emotions so as to display courtesy and impartiality to counsel and litigants . . . it does not follow that every deviation from the ideal requires a new trial.” *People v McIntosh*, 62 Mich App 422, 438; 234 NW2d 157 (1975), rev’d in part on other grds 400 Mich 1; 252 NW2d 779 (1977).

Here, the trial court’s comments showed grave concern and disapproval for defendant’s current and previous conduct, but the court showed neither bias nor a cavalier attitude toward defendant’s criminal history. For these reasons, we find that the trial court’s comments properly reflected the seriousness of the occasion and its prerogatives in the matter. Accordingly, we conclude that the sentencing court’s comments concerning defendant’s prior acquittals do not warrant resentencing.

B. The \$25,000 Fine

This Court reviews a trial court’s sentencing decisions for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). An abuse of discretion occurs when the trial court chooses an outcome falling outside a “principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Comporting with this characterization of the applicable standard is the principle that an abuse of sentencing discretion occurs where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The statute under which defendant was convicted, MCL 333.7401(2)(a)(iv), provides that violators are subject to “imprisonment for not more than 20 years or a fine of not more than \$25,000.00, or both.” Not in dispute is that defendant’s habitual offender status increases the potential maximum term of imprisonment to life. MCL 769.12(1)(a). In *Milbourn*, *supra* at 654, our Supreme Court observed: “Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then a trial court is not justified in imposing the maximum or

minimum penalty, respectively.” Here, defendant’s term of imprisonment—ninety-two months to twenty years—falls far short of the statutory maximum. But his \$25,000 fine remains the highest that the trial court could impose.

Our state constitution provides “excessive fines shall not be imposed.” Const 1963, art I, § 16. Within the constitutional framework; however, “the ultimate authority to provide for penalties for criminal offenses is . . . vested in the legislature.” *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45.

Defendant emphasizes that he was convicted of selling less than three grams of cocaine and argues that the sentencing court abused its discretion in imposing the highest possible fine. But the provision for a maximum fine of \$25,000 was but one sentencing component that the legislature authorized, the more onerous one being the potential maximum of life imprisonment.

“The possibility of a \$25,000 fine for possessing less than fifty grams of a mixture containing a controlled substance attempts to stifle the allure of potentially enormous profits from illegal drug trafficking.” *Antolovich*, *supra* at 718. The *Antolovich* Court held that a \$25,000 fine was excessive for a defendant who purchased and delivered one gram of cocaine on behalf of others, making no profit for himself, and who had no record of other such behavior. *Id.* In contrast, defendant delivered 2.46 grams of cocaine—not a large quantity, but larger than that involved in *Antolovich*—and did so as a seller under circumstances suggesting no motive other than profit, and as one with a long history of criminal activity, some of which the sentencing court identified as assaultive or also involving controlled substances.

Considered as a whole, if the circumstances of defendant’s crime did not add up to the most egregious of criminal conduct, neither did it constitute a mere trifle. Accordingly, the combination of the highest possible fine but an intermediate term of incarceration adds up to a sentence far enough removed from the harshest of possible punishments that it falls within the range of principled outcomes. For these reasons, we reject defendant’s challenge to the fine he received as part of his criminal sentence. It violates neither Const 1963, art 1, § 16 nor the principle of proportionality, *Milbourn*, *supra* at 636.

We affirm.

/s/ Peter D. O’Connell

/s/ Helene N. White

/s/ Jane E. Markey